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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 25

ELMER W. HENDERSON, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SOUTHERN RAILWAY COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES

This proceeding was brought by appellant to set aside an order of the Interstate Commerce Commission. As required by statute,[1] the United States was named as a defendant. The case is here on appeal from the judgment of the district court dismissing appellant's complaint, and the United States is a nominal appellee. Since the United States is of the view, however, that the order of the Interstate Commerce Commission is invalid, this brief sets forth the grounds upon which it is submitted that the judgment of the

[1] See Section 2322 of Title 28, United States Code.

district court is erroneous and should be reversed. See *Mitchell* v. *United States*, 313 U. S. 80, 92; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 574, note 6.

OPINIONS BELOW

The opinion of the specially constituted district court (R. 248) is reported in 80 F. Supp. 32. The report of the Interstate Commerce Commission (R. 4) appears at 269 I. C. C. 73. A prior opinion by the district court in this proceeding (R. 63) is reported in 63 F. Supp. 906, and a prior report of the Interstate Commerce Commission (R. 184) appears at 258 I. C. C. 413.

JURISDICTION

The judgment of the district court was entered on October 28, 1948 (R. 265). The petition for appeal was filed and allowed on November 17, 1948 (R. 266, 269). The jurisdiction of this Court to review by direct appeal the judgment entered in this case is conferred by Title 28, United States Code, Section 1253. Probable jurisdiction was noted by this Court on March 14, 1949 (R. 278).

STATUTE INVOLVED

Paragraph (1) of Section 3 of the Interstate Commerce Act as amended, 24 Stat. 380, 54 Stat. 902, 49 U. S. C. 3 (1), provides as follows:

> It shall be unlawful for any common carrier, subject to the provisions of this

part[2] to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

QUESTION PRESENTED

Whether the railroad's dining-car regulations, approved by the Interstate Commerce Commission, are unlawful because they subject passengers to discrimination and inequality of treatment, solely on grounds of race or color.

STATEMENT

On May 17, 1942, appellant, a Negro, was traveling as a first-class Pullman passenger on the Southern Railway from Washington, D. C.,

[2] The words "this part" refer to part I of the Act (see 49 Stat. 543), which applies to common carriers by railroad (49 U. S. C. 1 (1)).

to Birmingham, Alabama. He was making this trip as a field representative of the President's Committee on Fair Employment Practices, War Manpower Commission, to investigate violations of Executive Order No. 8802 alleged to have occurred in war industries in the Birmingham area. (R. 90–91, 97–99.)

When appellant entered the diner on the day in question shortly after it was opened for service at 5:30 p. m., white passengers were sitting at the two end tables which the railroad conditionally reserved for Negroes but there was at least one vacant seat at these tables. The dining-car steward told him that he could not then be served, and promised to send him word in his Pullman car if the end tables became vacant. Appellant came back to the diner at about 7 p. m. and again at about 7:30 p. m. At both times white people were eating at the end tables, as well as throughout the car, and appellant was told that he could not be served.[3] The steward never notified appellant that the end tables had become vacant, and at about 9 p. m. the diner was detached from the train. (R. 90–92, 190.)

It had long been the railroad's practice not to serve white and colored passengers at the same

[3] Appellant testified that on his first or second trip to the diner the steward said to him, "I am supposed to ask you if you will be served in your Pullman seat" (R. 95). Appellant declined the suggested tray service at his Pullman seat (R. 96).

time. The latter, "being in the minority," were served either before or after white passengers had eaten. With the increased passenger traffic in 1941 due to defense activities, one mealtime tended to run into the next, "leaving no time in which to serve Negro passengers." To meet this situation, the railroad installed curtains which might be drawn from the side of the car to the aisle so as to separate the two tables nearest the kitchen from the adjoining tables.[4] The railroad's regulations, as supplemented in August 1942, provided for drawing the curtains into position before mealtime and placing "Reserved" cards on the two curtained tables.[5] If all other seats had been taken before any colored passenger entered the diner, "the curtain should be pushed back, cards removed and white passengers served at those tables."[6] Any colored passenger appearing later was to be advised that he would be served

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[4] One of the railroad's waiters testified that this change permitted colored passengers to be served more readily, "Because before they had the curtains, they didn't have no way to 'Jim Crow' them off from the whites" (R. 145).

[5] The regulations which the railroad adopted in July 1941 and the supplement thereto adopted August 6, 1942, are set forth in the Appendix, *infra*, pp. 67–68.

[6] The railroad's vice-president in charge of transportation and operation testified that these arrangements were made "so the Jim Crow end would be vacant until every other seat was taken in the dining car" (R. 167).

as soon as the end tables were "vacated."[1] (R. 186–187.)

In October, 1942, appellant filed a complaint with the Interstate Commerce Commission charging that the railroad's refusal to serve him solely because of his race discriminated against him in violation of the Constitution and Section 3 of the Interstate Commerce Act (R. 80–82). He asked that the railroad be required to provide in the future non-discriminatory dining car service for Negro passengers, and for an award of damages (R. 83). The Commission ruled that although appellant had been subjected to undue prejudice and disadvantage on the particular trip, the railroad's dining car regulations met the requirements of the Act and that therefore no cease and desist order should be entered against the railroad (R. 190–192). On the question of damages, the Commission ruled that there could be no award because there had been no proof of "pecuniary loss" (R. 193–194). It accordingly entered an order dismissing appellant's complaint (R. 195).

On suit to set aside the Commission's order, the damage issue was eliminated from the cause by appellant's concession that the Commission's de-

[1] Of course, if additional white passengers were seated at the end tables as fast as those eating there finished and left, as was done when appellant was seeking service, this prevented Negro passengers from obtaining any dining car service (R. 75, 125).

nial of damages was not reviewable (R. 68).[5] As to the primary issue in the case, the validity of the railroad's current dining car regulations, the court below (sitting as a three-judge district court) held that the regulations were unduly prejudicial under the principles laid down in *Mitchell* v. *United States,* 313 U. S. 80, in that the curtained end tables were only conditionally reserved for Negro passengers whereas all other seats in the car were unconditionally reserved for white passengers (R. 74–78). The court therefore set aside the order entered by the Commission and remanded the case to it for further proceedings (R. 79–80). 63 F. Supp. 906.

On the reopening of the Commission hearings the railroad introduced in evidence new dining car regulations which it had adopted effective March 1, 1946.[6] They provide for reserving exclusively for Negro passengers one of the end tables nearest the kitchen, that on the left side of the aisle facing the buffet and seating four passengers. The curtain separating this table from the next one is to remain drawn to the aisle while meals are being served and a "Reserved" card

[5] This concession was made prior to the recent decision in *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, holding that an order of the Commission dismissing a claim for damages may be reviewed by ordinary one-judge district courts but not by three-judge courts set up under the provisions of the Urgent Deficiencies Act of 1913.

[6] The regulations are set forth in the Appendix, *infra,* p. 68.

is to be kept on the table except when it is occupied. All other tables are reserved exclusively for white passengers. (R. 198, 223.)

As to the table reserved for colored passengers, the railroad planned to install, in place of the curtain, a permanent partition about five feet high and to convert the space on the opposite side of the aisle into an office for the steward equipped with cash register and other needed supplies and materials (R. 199–201).[10] At the time of the hearing these changes had been made in only one diner[11] but the alterations were to be made in other cars as they were sent to the shops for repairs (R. 201). The railroad, in adopting the new regulations and in planning structural changes, had in mind conforming with both the decision of the district court condemning its prior regulations and the requirements of state segregation laws (R. 202, 205, 208).

The four seats set aside for Negroes represent 8.33% of the 48 seats in the diner (R. 9). Studies made by the railroad, covering an 11-day period and a 10-day period, of the meals served in its diners on the run between Washington, D. C., and Atlanta, Georgia, showed that the meals served to Negroes constituted, for the

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[10] A similar five-foot partition was to separate his "office" from the next table (R. 199).

[11] For illustrative photographs, see Exhibits 4–7, R. 224A–224D.

respective periods, 3.06 % and 4.22% of all meals served (R. 215, 217, 225, 237).

The Commission, with two members dissenting, upheld the validity of the amended regulations (R. 4–11) and the court below, with one judge dissenting, dismissed appellant's suit to set aside the Commission's order (R. 248, 261, 265). The court held that neither the Constitution nor Section 3 of the Interstate Commerce Act prohibited segregated dining car service for Negroes if, as was the case, the segregated accommodations were proportionate to the demand for dining car service by members of the Negro race (R. 253–260).

SUMMARY OF ARGUMENT

The order of the Interstate Commerce Commission approving the dining car regulations involved in this case is invalid on constitutional and statutory grounds. Both the Constitution and the Interstate Commerce Act give all persons traveling on interstate carriers the right to equal treatment, without being subject to governmentally-enforced discriminations based on race or color. Contrary to the holding below, the obligation of carriers to provide equality of treatment means equality as between individuals and not as between racial groups. The regulations are clearly unlawful in that they permit discrimination against individual passengers, white as well as colored, in situations

where available accommodations are denied solely on grounds of race or color. Beyond that, however, the Commission's order is invalid because it attempts to place the sanction of law upon a system of compulsory racial segregation which denies colored passengers the equality of treatment to which they are entitled under the Constitution and the Interstate Commerce Act. This case does not involve segregation by private individuals. The decisive factor here is that the segregation regulations bear the approval of an agency of government.

Segregation as enforced by the regulations imports the inferiority of the Negro race. Enforced racial segregation in itself constitutes a denial of the right to equal treatment. Equal treatment means the same treatment. The issues before the Court in this case are not governed by the so-called "separate but equal" doctrine of *Plessy* v. *Ferguson,* 163 U. S. 537, and related cases. Even assuming, *arguendo,* that that doctrine retains some vitality for constitutional purposes, it does not establish the validity, under Section 3 of the Interstate Commerce Act, of the railroad's regulations. But if the Court should conclude that the issues here cannot be decided without reference to the "separate but equal" doctrine, the Government submits that the legal and factual assumptions upon which *Plessy* v. *Ferguson* was decided have been

demonstrated to be erroneous, and that the doctrine of that case should now be re-examined and overruled. The notion that separate but equal facilities satisfy constitutional and statutory prohibitions against discrimination is obsolete. The phrase "equal rights" means the same rights.

ARGUMENT

THE RAILROAD'S DINING CAR REGULATIONS, APPROVED BY THE INTERSTATE COMMERCE COMMISSION, ARE UNLAWFUL BECAUSE THEY SUBJECT PASSENGERS TO DISCRIMINATION AND INEQUALITY OF TREATMENT, SOLELY ON GROUNDS OF RACE OR COLOR

I

PASSENGERS TRAVELING ON INTERSTATE CARRIERS HAVE THE RIGHT TO RECEIVE EQUAL ACCOMMODATIONS WITHOUT BEING DISCRIMINATED AGAINST BECAUSE OF RACE OR COLOR

The dining car regulations issued by the railroad and approved by the Interstate Commerce Commission are invalid, it is submitted, on both constitutional and statutory grounds. The premise of the Government's argument is that the right of all persons to equality of accommodations while traveling on interstate carriers is a right which is specifically guaranteed by the Interstate Commerce Act and which cannot be denied by the Federal Government, or any of its agencies, without violating the Fifth Amendment to the Constitution.

The meaning and requirements of "equality" are discussed in a later section of this brief.

particularly in connection with the so-called "separate but equal" doctrine of *Plessy* v. *Ferguson,* 163 U. S. 537, and related cases arising under the Fourteenth Amendment. In our view, "separate but equal" is as much a contradiction in terms as "black but white": facilities which are segregated by law, solely on the basis of race or color, cannot in any real sense be regarded as equal. The point we desire to stress at the outset, however, is that the ultimate criterion of legality, in assessing the validity of the regulations presented in this case, is the principle embodied in both the Interstate Commerce Act and the Constitution that all persons are entitled to *equality* of treatment, without being discriminated against because of race or color or other irrelevant factors.

Section 3 of the Interstate Commerce Act (quoted in full, *supra,* pp. 2–3) makes it unlawful for any common carrier subject to the Act "to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever". As was pointed out in *Mitchell* v. *United States,* 313 U. S. 80, 95, this provision of the Act has consistently been regarded as imposing a duty upon carriers to provide equality of treatment with respect to transportation facilities and as forbidding discrimination against colored passengers because of their race; colored persons must be furnished

with accommodations equal in comforts and conveniences to those afforded white passengers traveling on the same kind of ticket. See *Edwards* v. *Nashville, C. & St. L. Ry. Co.*, 12 I. C. C. 247, 249, quoted in the *Mitchell* opinion (*ibid.*) and other authorities there cited.

Section 3 represents action by Congress in furtherance of the fundamental constitutional principle that all men, regardless of their race or color, are entitled to equal treatment before the law.[12] In *McCabe* v. *Atchison, T. & S. F. Ry.*

[12] The laws and customs of the states in which the railroad operates do not modify or qualify the scope of the prohibitions of Section 3 of the Interstate Commerce Act. This Court so held as to state law imposing requirements respecting intrastate transportation inconsistent with those of Section 3 (*Mitchell* case, *supra*, at pp. 91–92), and, *a fortiori*, the requirements of the Act do not vary with the customs of the area in which the carrier operates. This is so, not primarily because of the need for prescribing a uniform national rule (see *Morgan* v. *Virginia*, 328 U. S. 373; *Hall* v. *DeCuir*, 95 U. S. 485), but because Section 3 applies equally to every carrier subject to part I of the Act and therefore may not be given one meaning in one community and a different one in another. If the segregation enforced in the railroad's dining cars does not violate Section 3 in a state which requires segregation in intrastate transportation, it also would not violate that section when enforced by a carrier operating in a state where the laws prohibit racial separation on public carriers. See Civil Rights Law of New York, Sec. 40, and compare *Brown* v. *Southern Ry. Co.*, 269 I. C. C. 711, 722; *To Secure These Rights*, Report of the President's Committee on Civil Rights, p. 78.

As in the case of other general prohibitions applicable to interstate commerce, "The law is its own measure of right and wrong." *Standard Sanitary Manufacturing Co.* v.

Co., 235 U. S. 151, 161, this Court recognized "the constitutional right" of individuals to "substantial equality of treatment of persons traveling under like conditions." And in the comparatively recent *Mitchell* case, Mr. Chief Justice Hughes' opinion for the Court stated: "The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment". (313 U. S. 80, 94.)

These holdings in the field of transportation are merely illustrative of the basic constitutional doctrine which condemns racial discriminations having the sanction of law or the support of an agency of government. See, e. g., *Shelley* v. *Kraemer*, 334 U. S. 1; *Hurd* v. *Hodge*, 334 U. S. 24; *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410; *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192; *Buchanan* v. *Warley*, 245 U. S. 60; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Strauder* v. *West Virginia*, 100 U. S. 303. These decisions, as well as others too familiar to require citation here, have given concrete application to the principle of constitutional law eloquently expressed by Mr. Justice Harlan: "Our

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United States, 226 U. S. 20, 49. Though Congress has power to "devise a national policy with due regard to varying interests of different regions," (Mr. Justice Frankfurter concurring in *Morgan* v. *Virginia*, 328 U. S. 373, 389), it has not, in Section 3, done so.

Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson,* 163 U. S. 537, 559 (dissent).

Racial discriminations effected by action of the Federal Government, or any agency thereof, are prohibited by the due process clause of the Fifth Amendment. To be sure, that Amendment contains no equal protection clause. But the Court has in numerous cases indicated that a federal discrimination may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment. *Hirabayashi* v. *United States,* 320 U. S. 81, 100; *Detroit Bank* v. *United States,* 317 U. S. 329, 338; *Currin* v. *Wallace,* 306 U. S. 1, 13; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 585. And see *Sims* v. *Rives,* 84 F. 2d 871, 878 (C. A. D. C.), certiorari denied, 298 U. S. 682; *United States* v. *Yount,* 267 Fed. 861, 863 (W. D. Pa.). Mr. Justice Murphy's concurring opinion in *Hirabayashi* observed: "We have consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments. [Citations]" 320 U. S. at 111. In its most recent formulation of the requirements of due process of law, the Court has described it as "the compendious expression for all those rights which the courts must enforce be-

cause they are basic to our free society." *Wolf* v. *Colorado,* 338 U. S. 25, 27.

There can be no doubt that the right to equal treatment before the law is basic to the free, democratic way of life established and protected by the Constitution of the United States. In *Hirabayashi* v. *United States,* 320 U. S. 81, 100, Mr. Chief Justice Stone wrote for the Court: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." And in *Korematsu* v. *United States,* 323 U. S. 214, 216, the Court's approach to racial restrictions was described as follows: "* * * all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."

In *Strauder* v. *West Virginia,* 100 U. S. 303, 306–307, the Court said:

> It [the Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * *

> * * * What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?

The *Strauder* case condemned the systematic exclusion of colored persons from juries. Similarly, the right to qualify as a voter in primary or general elections may not be denied because of race or color. *Nixon* v. *Herndon,* 273 U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73; *Smith* v. *Allwright,* 321 U. S. 649. The Court has held that the Constitution prohibits denial to a person, because of his race or ancestry, of the right to pursue his accustomed calling. *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410; *Truax* v. *Raich,* 239 U. S. 33; *Yick Wo* v. *Hopkins,* 118 U. S. 356. And all citizens, regardless of their color, are entitled to equality in the enjoyment of public educational facilities. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631.

Clearly, therefore, appellant has the right, both under the Constitution and the Interstate Commerce Act, to enjoy equality of accommodations as a passenger on an interstate carrier, and to be free from governmentally-enforced discrimination

against him because he is a Negro. The question that remains for consideration is whether the dining car regulations approved by the Interstate Commerce Commission deprive him of that right.[13]

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[13] Certain questions collateral to that of illegal discrimination are set at rest by the decision in *Mitchell* v. *United States*, 313 U. S. 80. Although these questions appear to be undisputed, the following brief reference to them may contribute to a more complete presentation of the case.

(1) Appellant has standing to bring this suit. The negative form of the Commission's order is "not controlling" and appellant is "an aggrieved party." It was not necessary for him to show, as a basis for his grievance against the regulations governing future dining car service, that he intended again to be a passenger on the railroad. It is sufficient that he is an American citizen free to travel and, as such, entitled to have "facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids." *Mitchell* case, pp. 92–93.

(2) The question of discrimination presented here does not call for exercise of "administrative or expert judgment" on a practical or technical problem of transportation as to which the Commission's ruling, if not arbitrary or lacking evidentiary support, might be conclusive. The functions of the Interstate Commerce Commission are obviously not such as to endow it with expertise in dealing with questions of racial discrimination. The application of the statute to the facts of this case presents a question of law as to which the courts are not bound to defer to the administrative agency's determination. *Mitchell* case, p. 97.

(3) The prohibitions of Section 3 apply to facilities for passengers, including dining car accommodations, and they bar discriminations as to such accommodations based on the race or color of the passenger. *Mitchell* case, pp. 94–95. (It may be noted that the Interstate Commerce Commission has uniformly recognized that these principles apply to dining car service but has, with equal uniformity, found no basis for

II

THE REGULATIONS ARE UNLAWFUL BECAUSE THEY PERMIT DISCRIMINATION AGAINST INDIVIDUAL PASSENGERS, WHITE AS WELL AS COLORED, SOLELY ON THE BASIS OF THE PASSENGER'S RACE OR COLOR

The court below upheld the validity of the railroad's dining car regulations upon the ground that the law is satisfied if "separate but equal" accommodations are provided for colored passengers, and that such accommodations are "equal" if they are proportionate to the average demand therefor by members of the Negro race (R. 260). We deal later with the court's "separate but equal" ruling (*infra*, pp. 23–49). In this section of the brief, we challenge the ruling that the constitutional and statutory obligation to treat all passengers alike requires equality of treatment, not as between *individuals*, but merely as between racial *groups*.

In *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, where a state law authorizing railroads to provide accommodations for white persons without providing similar accommodations for

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an award of damages or for entry of an order requiring a change in the railroad's practice. *Stamps* v. *Chicago, Rock Island & Pacific Ry. Co.*, 253 I. C. C. 557, 560; *Brown* v. *Atlantic Coast Line R. R. Co.*, 256 I. C. C. 681, 695; *LeFlore & Crishon* v. *Gulf, Mobile & Ohio R. R. Co.*, 262 I. C. C. 403, 407; *Barnett* v. *Texas & Pacific Ry. Co.*, 263 I. C. C. 171; *Mays* v. *Southern Ry. Co.*, 268 I. C. C. 352, 362; *Jackson* v. *Seaboard Air Line Ry. Co.*, 269 I. C. C. 399, 403; *Stamps & Powell* v. *Louisville & Nashville R. R. Co.*, 269 I. C. C. 789, 795–796.)

Negroes was attacked as violating the equal protection clause of the Fourteenth Amendment, the Court said (p. 161) that "the essence of the constitutional right is that it is a personal one."[14] The Court further said (pp. 161–162):

> It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier * * * a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

Mitchell v. *United States*, 313 U. S. 80, held that the right to equal treatment conferred by Section 3 of the Interstate Commerce Act is, like the right to equal protection of the laws guaranteed by the Fourteenth Amendment, personal to the individual. The Court held (p. 97) that equality of treatment is a right "specifically safeguarded" by Section 3 and that the "comparatively little colored traffic" cannot justify denial of this "fundamental right" to even a single colored passenger. "While the supply of particular facilities may be conditioned upon

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[14] The principle thus enunciated has subsequently been vigorously reaffirmed. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 350–351; *Shelley* v. *Kraemer*, 334 U. S. 1, 22. See also *Buchanan* v. *Warley*, 245 U. S. 60, 80; *Perez* v. *Lippold*, 198 P. 2d 17, 20 (Sup. Ct. Calif.).

there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused" (*ibid.*). This is because, as was held in the *McCabe* case with reference to the Fourteenth Amendment, it is the individual, "not merely a group of individuals, or a body of persons according to their numbers," who is entitled to equality (*ibid.*).

Section 3, as was noted in the *Mitchell* case (p. 97), makes it unlawful to subject "any particular person" to unreasonable discrimination. Its language thus expressly indicates that its thrust is for the protection of individuals.

The test to be applied to the railroad's regulations is, therefore, whether they provide for service which is nondiscriminatory as between individual passengers, without regard to their race or color. The regulations clearly fail to meet this test. When a Negro passenger seeks service at a time when the table reserved for members of his race is fully occupied but there are vacant seats elsewhere in the dining car, service which is available to other passengers is denied to him solely because of his race. Similarly, if a white passenger seeks service when there are vacancies only at the table reserved for colored passengers, service available to other passengers is withheld from him solely because of *his* color.

The fact that the discriminations may run equally against white as well as colored passengers does not give them sanction. The individual is entitled under the law to equality of protection, not equality of discrimination. Infringement of the rights of one individual is not condoned because the rights of another individual of a different race are similarly infringed. Concerning the rights created by the first section of the Fourteenth Amendment, this Court said in *Shelley* v. *Kraemer*, 334 U. S. 1, 22:

> The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

It is no defense that the unequal treatment permitted by the regulations may be infrequent or that it may entail delay in service rather than denial of all service. Under the carrier's practice involved in the *Mitchell* case, colored passengers, "if sufficiently diligent and forehanded," could obtain equal accommodations,[15] but the practice was nevertheless held to subject them

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[15] Although a Negro with a first-class ticket was denied an ordinary parlor car seat, he was given a drawing room compartment without extra charge provided one was available. See 313 U. S. 80, at pp. 90, 91.

to inequality and discrimination forbidden by Section 3. See 313 U. S. 80, at p. 96. Furthermore, as the dissenting opinion of Judge Soper in the court below said (R. 262), any distinction between the situation presented here and that in the *Mitchell* case "is one of degree and not of principle, for in both cases the arrangement is designed to take care of the demands of the race rather than those of the individual citizens."

III

THE REGULATIONS ARE UNLAWFUL BECAUSE THEY COMPEL PASSENGERS TO BE SEGREGATED ACCORDING TO THEIR COLOR; SUCH ENFORCED RACIAL SEGREGATION, HAVING THE SANCTION OF AN AGENCY OF GOVERNMENT, DENIES COLORED PASSENGERS THE EQUALITY OF TREATMENT WHICH IS THEIR RIGHT UNDER THE LAW

In Point II, *supra,* we have argued that the dining car regulations here involved are unlawful because they permit discrimination against an individual passenger, whether white or colored, in a situation where an available seat is denied him simply because it is reserved for a person of another race. We agree with Judge Soper, dissenting below, that the regulations as applied in such a situation clearly contravene the requirements of Section 3 of the Interstate Commerce Act. But a fundamental infirmity inheres in these regulations which goes much deeper and requires their invalidation for all purposes. The regulations, which carry the endorsement of an agency of government, compel colored passengers

to be segregated from other passengers solely because of their color. Such legally-enforced racial segregation in and of itself constitutes a discrimination and inequality of treatment prohibited by the Constitution and the Interstate Commerce Act.

A. Racial segregation under compulsion of law is not equality

Since these regulations bear the imprimatur of the Interstate Commerce Commission, they in effect lay down a rule of law that when a man travels on an interstate railroad, the color of his skin shall dictate where and with whom he is permitted to dine, no matter what his own desires may be. This case does not involve segregation by private individuals. These regulations establish a system of racial segregation enforced by and having the sanction of law. Cf. *Harmon* v. *Tyler,* 273 U. S. 668. The regulations do not merely permit voluntary segregation in the sense that they allow a passenger, if his prejudices so require, to refuse to eat at the same table or even in the same car with a passenger of another color. They go much further: a white passenger who has no prejudice against Negroes, or indeed, one who affirmatively desires the company of a colored person or persons, is forbidden by the regulations to have company of his own choice. The regulations compel such a passenger to yield to the prejudices of others. Under the regula-

tions here involved, persons traveling together, if they are of different color, cannot eat together regardless of their personal desires. Even if he so wishes, a white passenger is forbidden to sit at a colored table. In other words, the regulations do not merely carry out the prejudices of some members of the community; they compel everybody else to abide by such prejudices.

We do not argue that individuals do not, or should not, have a legal privilege to exercise a personal preference against eating at the same table, or in the same section of the dining car, with Negroes. If the regulations are declared unlawful, that individual privilege would remain unimpaired. A passenger who prefers to forego or postpone a meal rather than take it while a person of another color is being served in the same car would be free to do so. A passenger who objects to dining at the same table with a person of another color would be free to decline a seat proffered at a table where such a person is being served. The decisive point here, however, is that it is one thing to permit an individual to act on his personal prejudices; it is something entirely different for the law to force such prejudices upon everyone else.

In *Plessy* v. *Ferguson,* 163 U. S. 537, the first case holding that segregation does not violate the equal protection clause of the Fourteenth Amendment, the Court expressed the view that the

alternative to segregation is "an enforced commingling" of the white and colored races. This observation, as we shall argue in a later section of this brief, was irrelevant to the constitutional issue before the Court. In determining the validity of legislation alleged to involve an invidious racial discrimination, the inquiry is not whether the enactment will eradicate racial prejudice or solve problems of racial antagonism; the issue is simply whether it enforces, supports, or otherwise contributes to the denial of a constitutionally-protected right. But, in any event, the Court's dictum rests on an obviously false premise. If "commingling" between white and colored persons comes about as a consequence of nullifying segregation ordinances or regulations, such commingling is not "enforced" by the law. It is the result of voluntary conduct of the individuals concerned, acting not under the coercion of the law but in response to their own desires.

The alternative to compulsory segregation, therefore, is *not* an "enforced" commingling of the races. With non-segregated service, the individual passenger is free to avoid any "commingling" which he considers objectionable. Some individuals may object to eating in the same car with a Negro. Others will "draw the line" at eating at the same table with a Negro. Still others will feel that it makes no difference what the color of their fellow-passengers may be.

Whatever the individual's personal preferences or code of social behavior, no departure from it is "enforced" by anything except his own will.

It must be remembered, of course, that one who goes to a public place or rides a public conveyance necessarily surrenders some freedom of choice as to those with whom he will mingle. What was said in *Ferguson* v. *Gies*, 82 Mich. 358, 367–368, deserves repetition:

> The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he cannot in a public place carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears.

B. Segregation imports, and is designed to import, the inferiority of the Negro race

Segregation of Negroes, as practiced in this country, is universally understood as imposing on them a badge of inferiority.[16] It "brands the

[16] Myrdal, *An American Dilemma*, vol. I, pp. 615, 640; Johnson, *Patterns of Negro Segregation*, p. 3; Fraenkel, *Our Civil Liberties*, p. 201; Dollard, *Caste and Class in a Southern Town*, pp. 349–351; Note, 56 Yale L. J. 1059, 1060; Note, 49 Columbia L. Rev. 629, 634; Note, 39 Columbia L. Rev. 986, 1003.

Negro with the mark of inferiority and asserts that he is not fit to associate with white people".[17] Forbidding this group of American citizens "to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group."[18]

More than fifty years of subsequent history confirm and give new emphasis to the views expressed by Mr. Justice Harlan in his dissent in *Plessy* v. *Ferguson*, 163 U. S. 537, 562. He declared that the "arbitrary separation" of members of the Negro race when traveling in a public conveyance "is a badge of servitude." He further said (p. 560):

> What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

That the type of segregation imposed by the railroad's regulations is humiliating to those subjected to it is so obvious as scarcely to need documentation.' Myrdal has noted that "the Jim

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[17] *To Secure These Rights*, Report of the President's Committee on Civil Rights, 79.

[18] *Id.*, 82.

Crow car is resented more bitterly among Negroes than most other forms of segregation." [19] Johnson has described the trend among Negroes towards travel by automobile which "is considered worth the extra cost" because of "the emotional satisfaction derived from escaping humiliating treatment." [20] Dollard has indicated that the Negro understands this type of segregation as marking him off as inferior, "of not being worthy to participate fully in American social life." [21] See also appellant's brief in the instant case, Appendix, pp. 94–106.

One who is compelled to live in a ghetto, because of his color or creed, does not enjoy "equality", no matter how luxurious his abode. Cf. *Shelley* v. *Kraemer*, 334 U. S. 1, and *Hurd* v. *Hodge*, 334 U. S. 24. The same principle applies here. A colored passenger who is set apart in a corner by himself is in no real sense being treated as an equal. The curtain or partition which fences Negroes off from all other diners exposes, naked and unadorned, the caste system which segregation manifests and fosters. A Negro can obtain service only by accepting or appearing to accept, under the very eyes of his fellow passengers, white and colored, the caste status which the

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[19] Myrdal, *An American Dilemma*, vol. 1, p. 635.

[20] Johnson, *Patterns of Negro Segregation*, 270.

[21] Dollard, *Caste and Class in a Southern Town*, 350. See also Stouffer, et al., *Studies in Social Psychology in World War II, The American Soldier*, vol. 1, p. 561.

segregation signifies and is intended to signify. The effect of the railroad's regulations and practice emphasizes that their single purpose is to foster maintenance of a caste system. One side of the segregated table adjoins the side of the car. Of the other three sides, the curtain shuts off only one. The table is exposed to the view of those passing in the aisle, to those sitting at the table immediately across the aisle,[22] and to some extent to those sitting at other tables. One sociologist has commented that the curtain is "exposed only enough to indicate the intent to segregate."[23] Another commentator has described this type of separation as "merely a symbolic assertion of social superiority, a 'ceremonial' separation."[24]

Concerning the five-foot high wooden partition which the railroad proposed to erect as a substitute for the curtain, the remarks of Judge Soper in

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[22] When the change to a wooden partition is made, the space across the aisle will be occupied by the dining car steward rather than by white passengers (*supra*, p. 8).

[23] Johnson, *Patterns of Negro Segregation*, p. 321.

[24] McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional*, 33 Calif. L. Rev. 5, 27 at n. 94.

The Railroad's dining car steward testified that the curtain hangs on hooks on a rod and if it is not properly hooked up and gets only half drawn he "has done the technical thing" and will not take the trouble to draw the curtain fully (R. 160).

the course of the argument in the court below are pertinent and illuminating (R. 38):

> Why do you put up these absurd partitions? They don't conceal anything; they simply call attention of the white passengers to the fact that the colored person is dining there. It seems to me that it is just unnecessary humiliation.

Counsel for the railroad answered the question as to the reason for the partition by saying: "Simply to separate the two races." (R. 39.) He added that "it satisfies the white people, and it certainly is much *less offensive* to the negroes" (*ibid.*, italics supplied).

Section 3 of the Interstate Commerce Act forbids "undue or unreasonable prejudice or disadvantage in any respect whatsoever." The prohibition applies to "any discriminatory action or practice of interstate carriers" which Congress had "authority to reach." *Mitchell* case, p. 94. Under the broad and inclusive language of the section, the "substantial equality of treatment" which it requires (*id.*, p. 97) is plainly not confined to the physical elements of dining car service, such as food, tableware, etc. Manifestly, colored passengers would be discriminated against if the railroad's rules required its waiters to say, when serving them: "Don't think, because we have to serve you, that we believe you're as good as whites." The wrong would be compounded if a loud-speaking device carried these words to

every diner in the car. But in substance, although the form may have been less offensive, these were the conditions under which the railroad furnished dining car service to colored passengers.

If ex-convicts were given dining car service only at a table barred off from others, but open to view, and carrying a card, "Reserved for Ex-Convicts," we have no doubt that the courts would be quick to recognize the gross inequality of treatment. To make this analogy fit the facts of the present case, the traveling public would have to be informed that not only were ex-convicts thus segregated but also all descendants of ex-convicts, to the third or fourth generation.[25]

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[25] For the varying statutory and judicial definitions of "Negro" or "colored," see *Morgan* v. *Virginia*, 328 U. S. 373, 382–383; Mangum, *The Legal Status of the Negro*, ch. 1; Note, 34 Cornell Law Quar. 246, 247–251; Note, 58 Yale L. J. 472, 480–481.

"Without any doubt there is also in the white man's concept of the Negro 'race' an irrational element which cannot be grasped in terms of either biological or cultural differences. It is like the concept 'unclean' in primitive religion. It is invoked by the metaphor 'blood' when describing ancestry. * * * The one who has got the smallest drop of 'Negro blood' is as one who is smitten by a hideous disease. It does not help if he is good and honest, educated and intelligent, a good worker, an excellent citizen and an agreeable fellow. Inside him are hidden some unknown and dangerous potentialities, something which will sooner or later crop up. This totally irrational, actually magical, belief is implied in the system of specific taboos * * *." Myrdal, *An American Dilemma*, vol. 1, p. 100.

The colored passenger, paying the same price for his meal as other passengers, does not receive the same thing in return. True, he receives the same food, but the condition which is attached to receiving it is that he submit to having his mind bombarded with the message that he and all members of his race are classified as inferior, as constituting a lower social caste.[26] This message of humiliation comes, not as a single voice, but with all the reverberations of the entire pattern of segregation and discrimination of which it is a part. And that is not a matter of small consequence. The segregation which isolates the Negro from others in the community and marks him as ostracized, a kind of "untouchable," gravely affects his personality and causes serious psychological difficulties and disturbances (*infra*, pp. 50–54).

The Negro is plagued by the concept—evidence of which he constantly sees around him in his daily life—that he and his people are regarded as inferior.[27] It remains one of the most devas-

[26] "The fact that accommodations are identical in physical comfort does not make them really equal, since there is a social stigma attached to the position of the minority. To say that, since neither group can use the facilities reserved for the other, they are in an equal position is unrealistic; members of the minority know only too well the reasons for the segregation and are humiliated by it." Note, 39 Col. L. Rev. 986, 1003.

[27] "The word 'segregation' itself has come to represent to Negroes a crucial symbol of white attitudes of superiority." Stouffer, et al., *Studies in Social Psychology in World War II, The American Soldier*, vol. I, p. 566.

tating frustrations of his life. Under its impact, he does not dare to be a person of his own distinct uniqueness and individuality.[28] The persistent effort of Negro leaders to develop attitudes aimed at maintaining the human dignity of the Negro tells its own story.[29]

It is bad enough for the Negro to have to endure the insults of individuals who look upon him as inferior. It is far worse to have to submit to a formalized or institutionalized enforcement of this concept, particularly when, as in this case, it carries the sanction of an agency of government and thus appears to have the seal of approval of the community at large. Such enforced racial segregation in and of itself constitutes inequality.[30] In this situation, the phrase

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[28] Cooper, *The Frustrations of Being a Member of a Minority Group: What Does It Do To The Individual And To His Relationships With Other People?*, 29 Mental Hygiene 189, 190–191

[29] "The pledge to myself which I have endeavored to keep through the greater part of my life is:

> "I will not allow one prejudiced person or one million or one hundred million to blight my life. I will not let prejudice or any of its attendant humiliations and injustices bear me down to spiritual defeat. My inner life is mine, and I shall defend and maintain its integrity against all the powers of hell."

James Weldon Johnson, *Negro Americans, What Now?*, p. 103. See also Washington, *The Future of the American Negro*, p. 26.

[30] "No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of daily living *creates inequality* by imposing caste status on the minority group." [Italics supplied.] *To Secure These*

"separate but equal" is a plain contradiction in terms.

C. The "separate but equal" doctrine does not control the issues before the Court in this case, but that doctrine, if it be deemed applicable here, should be reexamined and discarded

The segregated basis on which the railroad furnished dining car service to colored passengers clearly constituted inequality of treatment condemned by Section 3 of the Interstate Commerce Act, unless it is to be interpreted as requiring only the trappings, not the substance, of equality. Such a narrow construction could not easily be squared with the "sweeping prohibitions" of the Act. *Mitchell* case, 313 U. S. at p. 94.[31] The court

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Rights, Report of the President's Committee on Civil Rights, 82.

"The Court has never faced the reality that segregation necessarily implies inequality, for equals do not hesitate to mingle with each other in public places. Any traveler in lands where segregation is practiced, be it the South where the victim is the Negro, or Nazi Germany where it is the Jew, knows that segregation is a badge of one race's claim to superiority over the other." Fraenkel, *Our Civil Liberties*, p. 201.

[31] The prohibition of "any undue or unreasonable prejudice or disadvantage in any respect whatsoever" is certainly as broad as the prohibition of denial of "full and equal accommodations," the phrase generally used in state statutes prohibiting discrimination. This prohibition has been uniformly held to apply to segregation. See, e. g., *Jones* v. *Kehrlein*, 49 Cal. App. 646; *Ferguson* v. *Gies*, 82 Mich. 358, 363; *Joyner* v. *Moore-Wiggins Co.*, 136 N. Y. S. 578, affirmed without opinion, 211 N. Y. 522; *Anderson* v. *Pantages Theatre Co.*, 114 Wash. 24. See also Mangum, *The Legal Status of the Negro*, pp. 34–38; Note, 39 Col. L. Rev. 986, 1003. Cf. *Railroad Co.* v. *Brown*, 17 Wall. 445, 451–453.

below has held, however, that the enforced segregation of Negro passengers in railroad dining cars is not a denial of their right to equal accommodations, and in support of this holding has relied on several decisions of this Court regarded as establishing the rule that "separate but equal" facilities satisfy the requirements of the law. It is submitted, however, that (1) the authorities relied on do not control the issues presented by this case, and that (2) if the so-called "separate but equal" doctrine be deemed applicable here, it should be reexamined and overruled.

(1) *Hall* v. *DeCuir,* 95 U. S. 485, the earliest of the cases cited in support of the ruling below, held only that a state enactment infringes upon the federal commerce power when it regulates an interstate carrier with respect to separation or non-separation of white and colored passengers. This ruling obviously has no application to the issues here presented. Cf. *Morgan* v. *Virginia,* 328 U. S. 373. Similarly, *Chiles* v. *Chesapeake & Ohio Rwy. Co.,* 218 U. S. 71, merely held that when an interstate carrier provides separate cars or compartments for the exclusive use of white passengers and others for the exclusive use of colored passengers, it does not exceed the limits of its authority to establish reasonable regulations governing the transportation service which it performs. This was implicitly held in the *De Cuir* case, and the *Chiles* case was regarded as con-

trolled by the earlier decision.[32] In the *Chiles* case the plaintiff did not at any stage of the proceeding rely upon any provision of the Interstate Commerce Act[33] and the briefs filed in this Court did not even mention Section 3 of the Act. The Court, in assuming that Congress had taken no action respecting segregation in interstate travel, referred to what was said and held on this point in the *De Cuir* case. See pp. 75–77. Since the Court's assumption as to nonaction by Congress was based on a case decided ten years before passage of the Interstate Commerce Act, and since it was made without giving any consideration to the anti-discrimination provisions of Section 3 of that Act, the decision cannot possibly be deemed a construction of the meaning or application of Section 3.

In *Mitchell v. United States*, 313 U. S. 80, the carrier had refused to give to the plaintiff, because of his race, any Pullman car accommodations.

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[32] Of the portion of the opinion in the *Chiles* case setting forth the grounds of decision (pp. 75–78), over two-thirds is devoted to a discussion of the *De Cuir* case and its application.

[33] The plaintiff had not filed a complaint with the Interstate Commerce Commission and therefore was probably barred from relying upon any claim of violation of the Interstate Commerce Act. If such a claim "necessarily involves a question of 'reasonableness,'" the Commission has "primary jurisdiction" and there can be no recovery in the absence of a ruling by the Commission on the question of violation. *United States v. Interstate Commerce Commission*, 337 U. S. 426, 437.

The case therefore presented, as this Court said (p. 94), "not a question of segregation but one of equality of treatment." To be sure, the Court's opinion appeared to agree with the view that the carrier's subsequent practice of furnishing a compartment to a colored passenger for the price of a Pullman seat "avoids inequality." See p. 96. This aspect of the decision is not, however, presently apposite. The type of segregation here involved is far more serious. When colored passengers are furnished dining car service only at a table partially screened off as a symbol and token of their separate and inferior status, the segregation is open, explicit, and humiliating.

Finally, reliance is placed most heavily on *Plessy* v. *Ferguson,* 163 U. S. 537, which ruled that state-enforced separation of white and colored persons under a statute requiring "equal" accommodations does not necessarily infringe the command of the Fourteenth Amendment that no State shall deny to any person the equal protection of the laws. We submit that, even assuming *arguendo* that the "separate but equal" doctrine retains some vitality for constitutional purposes, it does not establish the validity, under the Interstate Commerce Act, of the segregation enforced in the railroad's dining cars.

In the first place, the language of the statute provides a possible basis for distinction. The

prohibition of Section 3, that no carrier shall subject any person to "*any* undue or unreasonable prejudice or disadvantage *in any respect whatsoever*", is both precise and inclusive. This may conceivably be construed differently from the language of the "equal protection of the laws" clause of the Fourteenth Amendment, which has "a generality and adaptability * * * found to be desirable in constitutional provisions."[34]

In the second place, the statute and the constitutional provision differ in background and, to some extent, in purpose. In the *Plessy* case the Court gave as grounds for its ruling that the equal protection clause covers only "civil and political" rights and that enforced separation of the white and colored races does not infringe such rights. See 163 U. S. 537, at pp. 544, 551. As we have stated, we believe this holding to be erroneous. But, even if it be accepted, the same conclusion does not necessarily follow where the question is whether giving service to the members of a race under conditions which publicly stigmatize them as ostracized and inferior, when no such conditions attach to the service given others, is in conflict with the explicit statutory provision that no interstate carrier shall, in the course of the service which it renders, subject any person to "any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

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[34] See *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360.

In the third place, the present case comes within an exception to the "separate but equal" doctrine stated or plainly indicated in the *Plessy* opinion. The Court there said (p. 544) that laws requiring the separation of the white and colored races "do not *necessarily* imply the inferiority of either race to the other" (italics supplied). In other words, if the separation required did imply the inferiority of one race, the accommodations would be "separate" but they would not be "equal." While the *Plessy* case held that enforced separation is not in and of itself inequality, it did not hold that, as a matter of law, similar but separate physical accommodations are always equal. And if the question is one of fact, the facts of the present case establish beyond all doubt that the segregation which is enforced here is the antithesis of equality (*supra*, pp. 28–34).

(2) If this Court should conclude that the issues presented by this case cannot be considered without reference to the "separate but equal" doctrine, the Government respectfully urges that, in the half-century which has elapsed since it was first promulgated, the legal and factual assumptions upon which that doctrine rests have been undermined and refuted. The "separate but equal" doctrine should now be overruled and discarded.

The decision in the *Plessy* case appears to rest on two major premises. One is that laws requiring separation of the white and colored races

do not imply the inferiority of the colored race. The other is that segregation infringes only "social" rights and that these rights, as distinct from "civil" or "political" rights, are not within the ambit of the equal protection clause of the Fourteenth Amendment.

It is a question of fact what the community at large understands to be the meaning of singling out the members of the colored race for separation from all other citizens, whether it is in purchasing a bus ticket at the same ticket window, riding on the same street car or railroad coach, or going to the same restaurant, theatre or school. In the *Plessy* case the Court concluded that this minority race is not stigmatized as inferior, as constituting a lower social caste, when law decrees that it shall ride apart, eat apart, or stand in line for tickets apart. We submit that the Court's *a priori* conclusion cannot stand today in the face of a wealth of evidence flatly contradicting it.[35]

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[35] In addition to the materials and authorities cited elsewhere in this brief, see Myrdal, *An American Dilemma*, 100, 628; Dollard, *Caste and Class in a Southern Town*, 62–63, 266; Heinrich, *The Psychology of a Suppressed People*, 57–61; Sutherland, *Color, Class, and Personality*, 42–59; Johnson, *Patterns of Negro Segregation*, 270; Bond, *Education of the Negro and the American Social Order*, 384; Moton, *What the Negro Thinks*, 12–13, 99; Bunche, *Education in Black and White*, 5 Journal of Negro Education 351; *To Secure These Rights*, *supra*, 79, 82; Fraenkel, *Our Civil Liberties*, 201.

See also McGovney, *Racial Residential Segregation by*

We likewise believe that there was error in the second premise of the "separate but equal" doctrine enunciated in the *Plessy* case, namely, that enforced separation of the races affects only "social" rights not within the purview of the Fourteenth Amendment. The Amendment strikes at inequality without qualification. Certainly its language furnishes no basis for the distinction which the Court drew between "social" rights

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State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional, 33 Calif. L. Rev. 5, 27, note 94; Note, 39 Columbia L. Rev. 986, 1003; Note, 56 Yale L. J. 1059, 1060; Note, 49 Columbia L. Rev. 629, 634.

In *Collins* v. *Oklahoma State Hospital*, 76 Okla. 229, 231, the Court said: "In this state, where a reasonable regulation of the conduct of the races has led to the *establishment of separate schools and separate coaches*, and where conditions properly have erected insurmountable barriers between the races when viewed from a social and a personal standpoint, and where the habits, the disposition, and characteristics of the race *denominate the colored race as inferior* to the Caucasian, it is libelous per se to write of or concerning a white person that he is colored." [Italics supplied.]

In *Wolfe* v. *Georgia Railway & Electric Co.*, 2 Ga. App. 499, 505, the court said: "It is a matter of common knowledge, that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic time denies equality."

For other cases holding that applying the word "Negro" or "colored person" to a white man gives rise to an action for defamation see *Flood* v. *News & Courier Co.*, 71 S. C. 112; *Stultz* v. *Cousins*, 242 Fed. 794 (C. A. 6). See also *Louisville & Nashville R. R. Co.* v. *Ritchel*, 148 Ky. 701, 706; *Missouri, K. & T. Ry. Co.* v. *Ball*, 25 Tex. Civ. App. 500, 503; *Chicago R. I. & P. Ry. Co.* v. *Allison*, 120 Ark. 54, 60-61.

and those which are "civil" or "political." Furthermore, the distinction drawn is, at best, nebulous and largely a matter of emphasis. "In reality it is not possible to isolate a sphere of life and call it 'social.' There is, in fact, a 'social' angle to all relations."[36]

It is one thing to define social equality in terms of integration into white social organizations; it is another to define as "social" the right to equality in the use and enjoyment of public facilities.[37] Travel is for business as well as for pleasure. This Court has held that the Fourteenth Amendment requires "substantial equality of treatment" as to the facilities afforded to those who travel by railroad. *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 161.

In the *Plessy* case the Court also said (p. 551) that legislation is "powerless to eradicate" racial prejudice. This observation, even if true, was irrelevant to the constitutional issue before the Court. It might properly have been made before a legislative body considering the merits of a bill to penalize conduct manifesting racial prejudice. But the Court was not called upon to make a judgment of policy as to whether racial prejudice can be eradicated by legislation; the only question was whether a particular statute created, en-

[36] Myrdal, *An American Dilemma*, vol. 1, p. 642.
[37] Drake & Cayton, *Black Metropolis*, 121.

forced, or supported the denial of a constitutionally protected right. Statutes and ordinances may not in themselves remove racial antagonisms, but it is clear that they cannot constitutionally magnify such antagonisms by giving the sanction of law to what would otherwise be a private, individual act of discrimination. That is the basic vice of the Commission's order in this case.

In any event, the Court's observation is, at best, a half-truth. Although legislation cannot "eradicate" racial prejudice, experience has shown that it can create conditions favorable to the gradual disappearance of racial prejudice; or it can, on the other hand, strengthen and enhance it. Civil-rights and antidiscrimination statutes have been shown to have the former effect, and so-called Jim Crow laws the latter. A Commissioner of the New York State Commission Against Discrimination has recently written:

> Critics of fair-employment laws used to claim that long-established habits of discrimination could not be changed by legislation. Their argument has been unmistakably answered today. Nearly four years' experience in New York—and similar experience in New Jersey, Massachusetts, Connecticut, Washington, Oregon, New Mexico and Rhode Island, all of which have passed anti-discrimination legislation modeled after the New York law—indicates

conclusively that wise legislation creates a climate of opinion in which discrimination tends to disappear.[38]

On the other side of the picture, "Jim Crow" laws, which govern important segments of everyday living, not only indoctrinate both white and colored races with the caste conception, but they solidify the segregation existing outside these laws and give it respectability and institutional fixity.[39] As the Supreme Court of California has pointedly said, the way to eradicate racial tension is not "through the perpetuation by law of the prejudices that give rise to the tension."[40] In fields which "Jim Crow" laws do not cover there has been "a slow trend toward a breakdown of segregation"; within the fields of their operation the laws "keep the pattern rigid."[41]

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[38] Simon, *Causes and Cure of Discrimination*, New York Times, May 29, 1949, section 6, p. 10, at p. 35. "Can this technique of eliminating discrimination by rooting out the fears that cause it be applied successfully on a large scale? Our New York experience insists that the answer is an unequivocal 'Yes.' * * * we have changed the entire pattern of employment of the most populous state in the union in less than four years." (*Id.*, p. 36.) See *1948 Report of Progress*, New York State Commission Against Discrimination, pp. 11–12.

[39] Myrdal, *An American Dilemma*, vol. 1, pp. 579–580. See also Berger, *The Supreme Court and Group Discrimination Since 1937*, 49 Col. L. 201, 204–205.

[40] *Perez* v. *Sharp*, 32 Calif. 2d 711, 725.

[41] Myrdal, *An American Dilemma*, vol. 1, p. 635.

In the South, segregation in privately operated public services "is often less rigid than in those operated by government" (*id.*, p. 634).

We submit, moreover, that the Fourteenth Amendment, considered in the light of its history and purposes, furnishes no support for the "separate but equal" doctrine. The Amendment was primarily designed to establish Negroes as citizens and to protect them in the full enjoyment of rights concomitant to such status. This Court has said that "the chief inducement to the passage of the Amendment was the desire to extend federal protection to the recently emancipated race from unfriendly and discriminating legislation by the States." *Buchanan* v. *Warley,* 245 U. S. 60, 76. It is "to be construed liberally, to carry out the purposes of its framers," and the effect of its prohibitions is to declare that "the law in the States shall be the same for the black as for the white; * * * and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." *Strauder* v. *West Virginia,* 100 U. S. 303, 307. It was designed to forestall state legislation aimed at maintaining the subordinate status of those newly emancipated. When the Amendment was adopted, "it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be en-

acted or enforced to perpetuate the distinctions that had before existed." *Id.*, p. 306. See also the *Slaughter-House Cases*, 16 Wall. 36, 70–72, 81.

Segregation does not appear to have been specifically discussed in the debates on the Amendment itself. The apparent reasons for this were that the first section of the Fourteenth Amendment was designed to secure the analogous provisions of Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, by incorporating them into the Constitution,[42] and that the question of segregation had been fully considered during the debates preceding passage of the Civil Rights Act of 1866. The opponents of the bill had repeatedly argued that it would require the abolition of separate schools.[43] While a few advocates of the measure disputed this,[44] it is far from clear that a majority of the bill's supporters shared this view. Contemporaneous press comment reflects the general understanding that the bill would prohibit segregation.[45]

The debates preceding enactment of the Civil Rights Act of 1875, 18 Stat. 335, show even more clearly that the Amendment was understood to outlaw state-enforced segregation. The bill in

[42] Flack, *Adoption of the Fourteenth Amendment*, 20, 81, 94–95.

[43] Cong. Globe, 39th Cong., 1st Sess., 499, 500, 1268.

[44] *Id.*, 1117–1118, 1294.

[45] Flack, *supra*, at 41, 44–45, 53–54.

its original form provided that all persons, without distinction as to race or color, should be entitled to "equal and impartial" enjoyment of any accommodation furnished by common carriers, public schools, innkeepers and the like.[46] Both supporters and opponents of the measure construed it as invalidating racial segregation.[47] Proposed amendments to permit local communities to provide equal but separate educational facilities were defeated in both branches of Congress.[48] While express reference to public schools was finally eliminated,[49] its elimination was not because of doubt of the power of Congress under the Fourteenth Amendment, since the "full and equal" requirement was retained as to other accommodations, advantages and facilities.

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[46] Cong. Globe, 42d Cong., 2d Sess., 244 (1871). The bill was first introduced by Senator Sumner as an amendment to another measure on December 20, 1871. Each succeeding session it was reintroduced with immaterial variations until its passage in 1875. The change from "equal and impartial" to "full and equal" in the Act's final form appears to be without significance.

[47] Cong. Globe, 42d Cong., 2d Sess., 763, 843–845, 3258–3262 (1872); 2 Cong. Rec. 4116, 4143–4145, 4167–4169, 4171–4174 (1874). See also Flack, *supra*, 250–276.

The Civil Rights Act of 1875 was eventually declared unconstitutional upon the ground that it operated directly upon individuals, whereas the prohibitions of the Fourteenth Amendment run only against state action. *Civil Rights Cases*, 109 U. S. 3.

[48] Cong. Globe, 42d Cong., 2d Sess., 3258–3262 (1872); 2 Cong. Rec. 4167 (1864); 3 Cong. Rec. 1010 (1875).

[49] 3 Cong. Rec. 1010.

Since Section 5 of the Fourteenth Amendment authorizes Congress to enforce only the provisions of the Amendment, the passage of prohibitory legislation embracing racial segregation clearly shows that a majority of both branches of Congress thought that segregation came within the prohibitions of the Amendment.

D. The harm to the public interest which has resulted from enforced racial segregation argues against its extension to the field of interstate transportation

The effects of the segregation to which Negroes are subjected are not confined to those who are colored. They extend also to those who are white, and they bear vitally upon the interests of the Nation as a whole. We submit that the harmful effects to the public interest which have resulted from racial segregation furnish persuasive grounds for rejecting its extension to the field of interstate transportation. In addition, the materials referred to in this section of the brief conclusively refute the notion that facilities segregated on a racial basis can in any circumstances be regarded as equal.

1. Effect on Negroes

Segregation is a dominant factor in every aspect of the Negro's life. It limits his physical movements and economic opportunities, and adversely affects his personality and social development. It is much more than jim-crowism in ve-

hicles and public places. It is an ostracism symbolizing inferiority which colors his thoughts and action at almost every moment.[50]

Professional opinion is almost unanimous that segregation has detrimental psychological effects on those segregated. A questionnaire addressed to 849 representative social scientists was answered by 61% of those to whom it was sent.[51] Of those replying, 90.4% believed that enforced segregation has "detrimental psychological effects" on those segregated if "equal facilities" are provided, 2.3% expressed the opposite opinion, and 7.4% did not answer the question or ex-

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[50] "Every time I think about it, I feel like somebody's poking a red-hot iron down my throat. Look! we live here and they live there. We black and they white. They got things and we ain't. They do things and we can't. It's just like living in jail. Half the time I feel like I'm on the outside of the world peeping in through a knothole in the fence." Cooper, *The Frustrations of Being a Member of a Minority Group: What Does It Do to the Individual and to His Relationships with Other People?* 29 Mental Hygiene 189, 193, quoting from *Native Son* by Richard Wright.

[51] Deutscher & Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion*, 26 Journal of Psychology 259, 261, 262. The questionnaire was sent to all members of the American Ethnological Society, to all psychologists who were members of the Division of Social Psychology and Personality of the American Psychological Association, to all sociologists who were members of the American Sociological Society and listed race relations or social psychology as a major or dominant interest, and to sociologists who had published research on race relations during the period 1937–1947 (*id.*, 260). Nearly two-thirds of those who replied gave personal professional experience as a basis for the opinion expressed (*id.*, 271).

pressed no opinion.[52] Those who elaborated their position with comments (55% of those replying) stressed that segregation induced feelings of inferiority, insecurity, frustration, and persecution, and that it developed, on the one hand, submissiveness, martyrdom, withdrawal tendencies, and fantasy, and on the other hand, aggression.[53]

The resentment and hostility provoked by segregation find various means of psychological "accommodation," various forms of release.[54] Medi-

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[52] *Id.*, 261, 266.

[53] *Id.*, 272–277.

[54] "A constant stream of stimuli bombarding the personality with feelings of humiliation, must inevitably produce among others a state of continuously existing hatred, which unable to discharge itself directly on the offending stimulus, remains floating, to be released in a greatly exaggerated form on the first suitable object." Prudhomme, *The Problem of Suicide in the American Negro*, 25 Psychoanalytic Review 187, 200;

"Accommodation involves the renunciation of protest or aggression against undesirable conditions of life and the organization of the character so that protest does not appear, but acceptance does. It may come to pass in the end that the unwelcome force is idealized, that one identifies with it and takes it into the personality; it sometimes even happens that what is at first resented and feared is finally loved. In this case a unique alteration of the character occurs in the direction of masochism." Dollard, *Caste and Class in a Southern Town*, 255.

"Even though their personalities seem well accommodated to the caste system, it should not be thought that the Negroes are too stupid to realize the nature of the situation. They understand it quite well, in fact much better than do members of the white caste who naturally wish to disguise and extenuate it out of loyalty to our democratic theory which

ocrity is accepted as a standard because of the absence of adequate social rewards or acceptance.[55] Energy and emotion which might be constructively used are lost in the process of adjustment to the "Jim Crow" concept of the Negro's charac-

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does not countenance caste and class gains. * * * We may believe, then, that Negroes will perceive the caste and class distinctions as a chronic frustration situation. In such a situation we should expect aggression from them. What, in fact, do they do?

"There seem to be five possibilities of action on the part of the Negroes in the face of these gains [since slavery]. They can:

"(1) Become overtly aggressive against the white caste: this they have done, though infrequently and unsuccessfully in the past.

"(2) Suppress their aggression in the face of the gains and supplant it with passive accommodative attitudes. This was the slavery solution and it still exists under the caste system.

"(3) Turn aggression from the white caste to individuals within their own group. This has been done to some extent and is a feature of present-day Negro life.

"(4) Give up the competition for white-caste values and accept other forms of gratification than those secured by the whites. This the lower-class Negroes have done.

"(5) Compete for the values of white society, raise their class position within the Negro caste and manage aggression partly by expressing dominance within their own group and partly by sheer suppression of the impulse as individuals. This is the solution characteristic of the Negro middle class." Dollard, *supra*, 252–253.

[55] "The middle-class Negro tries to maintain allegiance to the dominant American standards and then experiences the bitter fact that this allegiance is not rewarded as it is in the white caste; instead he is ignominiously lumped with persons in his own class whose behavior standards are inferior to his own." Dollard, *supra*, 424.

"In order for any individual to mature, that is, to be will-

teristics and his inferior status in society.[56] Psychosomatic disease is induced by the tensions en-

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ing to assume responsibility in work and in personal relations; he must feel that there is some hope of attaining some of the satisfactions of maturity. * * * White society gives him [the Negro] little share in any of the mature gratifications of creative work, education, and citizenship. It would not be remarkable if, deprived of all mature gratifications, he lost zest for responsible action." McLean, *Group Tension*, 2 Journal of American Medical Women's Association 479, 482.

[56] "One of the most devastating frustrations that plague the Negro is the majority concept that the Negro people are inferior; that always they remain infantile or childlike; that their smiling, happy faces are but conclusive evidence that they are not capable of seriousness of purpose or of sustained intellectual participation. * * * All of us know the terrific impact that constant repetition has upon the psyche. * * * The Negro is born into a culture that stubbornly refuses to accept him as an equal. Custom and tradition force the majority concept of his inferiority into his consciousness and keep it there.

"Let us next consider the frustrations involved in the process of never being allowed to be one's self, never daring to be a person in one's own distinct uniqueness and individuality. * * * Negroes when in contact, casual or prolonged, with other Negroes, invariably turn the conversation to a discussion of race, its implications and methods of solving the problem, either through individual or through collective action. When Negroes are in the company of white persons, the conscious awkwardness, the studied carefulness, the restraint, the unconscious tones and undertones—all these are a constant reminder to the Negro that he is a Negro and that his status is that of a dispossessed minority. Imagine, if you will, the tremendous emotional energy expended in the process of never being able to be unaware of one's self. Imagine, if you can, the tragedy of the diffused and dissipated energy that is lost in the process of having

gendered by segregation and other forms of racial discrimination.[57]

The extensive studies made of Negro troops during the recent war furnished striking example of how racism, of which segregation is the sharpest manifestation, handicaps the Negro. The most important single factor affecting integration of the Negro into Army life was that he had to carry the burden of race prejudice in addition to

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constantly to think of one's designated and specifically limiting minority role." Cooper, *The Frustrations of Being a Member of a Minority Group: What Does It Do to the Individual and to His Relationships with Other People?*, 29 Mental Hygiene 189, 190–191.

[57] "The high incidence of hypertension among southern Negroes is probably one indication of an unconscious attempt at mastery of the hostility which must be controlled. The chronic rage of these individuals produces the hypertension which initially is fluctuating in character. Eventually the pathological changes resulting from this overload on the cardiovascular renal system lead to a consistently high blood pressure. All available evidence from clinicians indicates that functional (that is, psychosomatic) disease is markedly on the increase in the Negro." McLean, *Psychodynamic Factors in Racial Relations*, The Annals of the American Academy of Political and Social Science (March 1946), 159, 161.

"The psychology of the Negro developed in the repressive environment in which he lives might be described as the psychology of the sick * * * It is impossible to estimate what are the pathological results of the above outlook on life. It must certainly mean a reduction in that energy that characterizes healthy organisms." Frazier, *Psychological Factors in Negro Health*, Journal of Social Forces, vol. 3, p. 488.

all of the other problems faced by the white soldier.[58]

For a general discussion of the effects of the caste system, which segregation supports and exemplifies, on Negro personality and behavior, see Myrdal, *An American Dilemma,* vol. 2, pp. 757–767.

2. Effect on Whites

Segregation also detrimentally affects the dominant white group.[59] "Segregation and discrimination have had material and moral effect on whites, too. Booker T. Washington's famous remark, that the white man could not hold the Negro in the gutter without getting in there himself, has been corroborated by many white Southern and Northern observers." Myrdal, *An American Dilemma,* vol. I, pp. 643–644. The white person must adjust himself, consciously or unconsciously, to the hypocrisy of a double standard violating the American creed which he professes to follow. Feelings of guilt are generated and moral values weakened; the basic realities of the racial problem are diverted into the mechanism of segregation:

> Those who segregate others soon become frightened, insecure people forced to ac-

[58] *Studies in Social Psychology in World War II,* vol. I, chap. 10. See particularly pp. 502, 504, 507.

[59] Deutscher & Chein, *supra,* 26 Journal of Psychology 261, 267.

> cept and invent prejudice to justify their actions. They become hyprocrites who either close their eyes to stark reality or invent slogans to hide fundamental issues. The master classes, no less than the subjected, become victims of the system.[60]

Segregation and practices allied to it promote the master-race psychology, thus sowing the seeds for oppressive individual and collective action.

3. Effect on the Nation

Segregation is part of a vicious cycle. It prevents groups from knowing each other. This lack of knowledge engenders distrust and antagonism. They in turn stimulate the demand for sharp cleavage between races and maintenance of a system of segregation. Thus groups within the Nation are kept asunder.[61]

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[60] Weaver, *The Negro Ghetto*, 270.

[61] From these natural causes the white man's knowledge of Negro life is diminishing and the rate is accelerated by the present-day policy of segregation. This operates practically to make an ever-widening gulf between the two races which leaves each race more and more ignorant of the other. Without contact there cannot be knowledge; segregation reduced the contacts, and so knowledge and understanding decrease. With decreasing knowledge comes increasing distrust and suspicion, and these in turn engender prejudice and even hatred. So a vicious circle is established whose ultimate effect, unless counteracted, must be a separation of the races into more or less opposing camps, with results as disastrous to the spirit of American institutions as to the genuine progress of both races." Moton, *What the Negro Thinks*, 5. See also Dollard, *Caste and Class in a Southern Town*, *supra*, 73.

Experience and informed opinion are in agreement that normal contacts between the races diminish prejudice while enforced separation intensifies it.[62] Race relations are improved by living together,[63] working together,[64] serving together,[65] going to school together.[66] The absence of a color line in certain countries goes far to show that racial prejudice is not instinctive or hereditary, but is rather kept alive by man-made barriers such as segregation.[67]

The experience of the Sperry Gyroscope Company is noteworthy. Its employment of Negroes began in 1941 and steadily progressed until, by 1944, one-third of its Negro employees were in highly skilled occupations, one-third in semi-

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[62] Sancton, *Segregation: The Pattern of a Failure*, Survey Graphic (Jan. 1947), p. 10; Yarros, *Isolation and Social Conflicts*, 27 American Journal of Sociology, 211.

[63] *To Secure These Rights*, Report of the President's Committee on Civil Rights, 85–86; Lee & Humphrey, *Race Riot*, 17.

[64] Brophy, *The Luxury of Anti-Negro Prejudice*, 9 Public Opinion Quarterly 456; Oppenheimer, *Non-Discriminatory Hospital Service*, 29 Mental Hygiene 195.

[65] *Studies in Social Psychology in World War II*, vol. I, pp. 594–595; Nelson, *The Integration of the Negro into the United States Navy* (Navy Dept., 1948), 71–72.

[66] *Race Riot*, *supra*, p. 17; Ware, *The Role of Schools in Education for Racial Understanding*, 13 Journal of Negro Education, 421–424.

[67] Pierson, *Negroes in Brazil*, 336, 344–350.

skilled, and one-third in other jobs.[68] In the words of the president of the company:

> The initial employment of Negroes and each subsequent extension of their employment into new categories was received with doubt by the supervisors, and, in some cases, by rumblings and even threats of trouble from some groups of white workers. The threats never materialized, the doubts disappeared and were succeeded by friendliness and cooperation in helping the Negro to learn his new job and to progress to a better one. I know of no instance now where the Negro worker is not judged entirely on the basis of his competency and without consciousness of his race.

A marked change in attitude occurred in white soldiers who served in combat with Negro troops. Two out of three admitted that at first they had been unfavorable to serving with Negro troops. Three out of four stated their feelings had changed after service with them in combat. And a survey of opinion of white servicemen on the question of including Negro and white platoons in the same company showed that their willingness to accept such integration was in direct ratio to their closeness to actual combat experience with Negro troops.[69]

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[68] Gillmor (president of Sperry Gyroscope Co.), *Can the Negro Hold His Job?*, National Association for the Advancement of Colored People Bulletin (Sept. 1944) 3–4.

[69] Report No. ETO–82, Research Branch, European Theatre of Operations of the Army, as summarized in *To Secure These Rights*, *supra*, 83–85.

Rebellion against constituted authority (parental, school or state) is, for the adolescent, a normal manifestation of growth toward independence. But, in the case of many, the apparent hypocrisy of a society professing equality but practicing segregation and other forms of racial discrimination furnishes justification and reason for the latent urge to rebel, and frequently leads to lasting bitterness or total rejection of the American creed and system of government.

Recently a Congressional committee summoned "Jackie" Robinson, the Negro baseball star, as a witness to rebut certain widely publicized statements which had questioned the loyalty of large numbers of the Negro race. He testified: [70]

> Just because Communists kick up a big fuss over racial discrimination when it suits their purposes, a lot of people try to pretend that the whole issue is a creation of Communist imagination.
>
> But they are not fooling anyone with this kind of pretense, and talk about "Communists stirring up Negroes to protest," only makes present misunderstanding worse than ever. Negroes were stirred up long before there was a Communist Party, and they'll stay stirred up long after the

[70] *Hearings Regarding Communist Infiltration of Minority Groups, Part I*, House Committee on Un-American Activities, 81st Congress, 1st Sess., p. 479.

party has disappeared—unless Jim Crow has disappeared by then as well.

In our foreign relations, racial discrimination, as exemplified by segregation, has been a source of serious embarrassment to this country. It has furnished material for hostile propaganda and raised doubts of our sincerity even among friendly nations. A letter from Mr. Dean Acheson, then Acting Secretary of State, to the Fair Employment Practice Committee on May 8, 1946, stated:[71]

> * * * the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. While sometimes these pronouncements are exaggerated and unjustified, they all too frequently point with accuracy to some form of discrimination because of race, creed, color, or national origin. Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged. * * *
>
> I think it is quite obvious * * * that the existence of discriminations against minority groups in the United States is a

[71] Quoted in *To Secure These Rights*, *supra*, 146–147.

handicap in our relations with other countries.

Recent remarks of representatives of foreign powers in a subcommittee of the United Nations General Assembly typify the manner in which racial discrimination in this country is turned against us in the international field.[72] The references to this subject in the unfriendly foreign press are frequent and caustic.[73]

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[72] In discussing a Bolivian proposal concerning aboriginal populations of the American continent, the Soviet representative said:

> Guided by the principles of the United Nations Charter, the General Assembly must condemn the policy and practice of racial discrimination in the United States and any other countries of the American continent where such a policy was being exercised. (United Nations, General Assembly, *Ad Hoc* Political Committee, Third Session, Part II, Summary Record of the Fifty-Third Meeting (May 11, 1949), p. 12.)

Another Soviet representative stated:

> In the southern states, the policy of racial discrimination was actually confirmed by law and most strictly observed in trains, restaurants, cinemas, and elsewhere (*id.*, Summary Record of Fifty-Fourth Meeting (May 13, 1949), p. 3).

The Polish representative said:

> The representative of Poland did not, however, believe that the United States Government had the least intention to conform to the recommendations which would be made by the United Nations with regard to the improvement of living conditions of the coloured population of that country (*id.*, p. 6).

[73] Thus an article in *The Bolshevik* (U. S. S. R.) No. 15, 1948 (Frantsov, *Nationalism—The Tool of Imperialist Reaction*), contain the statement: "The theory and practice of racial discrimination against the Negroes in America is known to the whole world. The poison of racial hatred has

Our opposition to racial discrimination has been affirmed in treaties and international agreements. The Charter of the United Nations has been approved as a treaty (59 Stat. 1213). By Article 55, the United Nations agree to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (59 Stat. 1046).

At the Inter-American Conference on Problems of War and Peace at Mexico City in 1945, this country joined with the other participants in adopting Resolution No. 41, which reaffirms the principle of equality of rights and opportunities for all men "regardless of race or religion" and recommends that the Governments of the American Republics make every effort to prevent in their respective countries "all acts which may

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become so strong in post-war America that matters go to unbelievable lengths; for example a Negress injured in a road accident could not be taken to a neighbouring hospital since this hospital was only for 'whites.'" Similarly, in the *Literary Gazette* (U. S. S. R.) No. 51, 1948, the article *The Tragedy of Coloured America*, by Berezko, states "It is a country within a country. Coloured America is not allowed to mix with the other white America, it exists within it like the yolk in the white of an egg. Or, to be more exact, like a gigantic ghetto. The walls of this ghetto are invisible but they are nonetheless indestructible. They are placed within cities where the Negroes live in special quarters, in buses where the Negroes are assignd only the back seats, in hairdressers where they have special chairs."

provoke discrimination among individuals because of race or religion." [14]

Racial segregation enforced by law hardly comports with the high principles to which, in the international field, we have subscribed. Our position and standing before the critical bar of world opinion are weakened if segregation not only is practiced in this country but also is condoned by federal law.

Mr. Justice Harlan said in his memorable dissent in the *Plessy* case (163 U. S. at 562):

> We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

Various subterfuges have been employed during the years since the adoption of the Thirteenth and Fourteenth Amendments to evade and nullify the effects of their provisions. The emancipation of an entire race has proved a most complicated task. More than three-quarters of a century has not been enough time within which to break down the barriers surrounding the enslaved, and to

[14] Department of State Publication 2497 (Conference Series 85) p. 109.

bring them to the full dignity and stature of free citizens. Discrimination, political, economic, and social, is still widespread. However, there are indications that the process of education, of lessening the incidence of unreasoning prejudice, lagging for so many years, is increasing in momentum.

Racial antagonisms become acute in localities, and it is there that discriminatory acts are practiced, legislation is enacted and on occasion validated by courts unwittingly responding to their environment. And so this Court has been faced through the years with one controversy after another in which efforts were made to obtain approval of measures cleverly calculated to keep the Negro in bondage, to prevent him from enjoying his full rights as a citizen, and to pervert the true intent and meaning of the Thirteenth and Fourteenth Amendments. This Court has stricken down acts of local law-making bodies and officials depriving the Negro of the right to vote, to serve on petit and grand juries, and of the right to acquire and use property. More recently, it has restrained judicial enforcement of racial restrictive convenants on real property. In other fields, this Court has acted to compel local authorities to provide the Negro with opportunities for education previously denied him.

The evasions and violations of the Constitution are being gradually eliminated. One handicap is

the approval, given in another day and generation, to the proposition that the Constitution could be satisfied and friction removed by the establishment of "separate but equal" facilities. Experience has shown that neither the Constitution, nor the laws enacted under its authority, nor the individuals affected, are given the required respect and status under such an arrangement. "Equal" facilities, if separate, are rarely if ever equal, even in a physical sense. In most situations they have been used to cloak glaring inequalities. And the very idea of separate facilities or separate rights, is in itself a negation of the full and complete possession of privileges and immunities of citizenship.

So long as the doctrine of the *Plessy* case stands, a barrier erected not by the Constitution but by the courts will continue to work a denial of rights and privileges and immunities antagnostic to the freedoms and liberties on which our institutions and our form of government are founded. "Separate but equal" is a constitutional anachronism which no longer deserves a place in our law. The Court has said that "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." *Wolf* v. *Colorado*, 338 U. S. 25, 27. It

is neither reasonable nor right that colored citizens of the United States should be subjected to the humiliation of being segregated by law, on the pretense that they are being treated as equals.

CONCLUSION

It is respectfully submitted that the judgment of the district court should be reversed and that the Interstate Commerce Commission should be directed to enter an order prohibiting the railroad from furnishing dining car service to passengers segregated on a basis of race or color.

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OCTOBER 1949.

APPENDIX

RAILROAD'S DINING CAR REGULATIONS

Regulations adopted in July 1941

Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them. [R. 186.]

Supplementary regulations adopted August 6, 1942

Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.

These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtains should be pushed back, cards removed and white passengers served at those tables.

After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"Reserved" cards are being supplied you. [R. 186–187.]

Regulations effective on and after March 1, 1946

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

(3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

(4) These rules become effective March 1, 1946. [R. 7–8.]

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